KWAN CHEW SHEN

v.

CITIBANK, N.A.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[BANKRUPTCY NO. 1803 OF 1981]
20 OCTOBER 1986

BANKRUPTCY: *Registered proprietor adjudged a bankrupt - Thereafter property was charged by adjudged bankrupt - and charge registered - Official Assignee failed to publish and advertise the notice of adjudication of bankruptcy - Bankruptcy Act 1967 - Section 24(5) - Declaration that charge is void - Sections 49, 54, 24(4) of the Bankruptcy Act - Section 24(4) to be read subject to provisions in the National Land Code.*

This is an application by the Official Assignee for a declaration that the charge created and registered after the receiving order had been made did not enjoy the protection of s. 54 of the Bankruptcy Act 1967 ("the Act") and therefore is void. The property was charged to the respondent bank by the registered proprietor who was adjudged bankrupt on 23 August 1982. However, the Official Assignee omitted to advertise the notice of adjudication as required under s. 24(5) of the Act.

Held:

[1] Section 24(4) of the Act has to be read subject to s. 349 of the National Land Code. Section 24(4) in the context of the Torrens System has the effect that upon the adjudication of bankruptcy, land and interest in land belonging to the bankrupt vest in equity only and not at law in the Official Assignee. It will only vest in the Official Assignee at law when the requirements of the law of registration as provided by s. 349 of the National Land Code have been met.

[2] The provisions of s. 49 of the Act for there to be a second or subsequent receiving order fortify the view that a bankrupt in fact is competent to enter into contracts other than those that he had specifically been excluded from entering into. There appears to be no blanket provision anywhere to the effect that a bankrupt is incapable of making a contract.

[Application dismissed with costs.]

Cases referred to:
In re Wigzell, ex parte Hart [1921] 2 KB 835
Eng Mee Yong v. Letchumanan [1980] AC 331
Damodaran v. Choe Kuan Him [1980] AC 497
Fels v. Knowles [1906] 26 NZLR 604
In re Lockwood Alberton v. Brooke [1958] Ch 231
Adler v. George [1964] 2 QB 7
Messiter v. Wollerman 27 NZLR 581

Legislation referred to:
Contracts Act 1950 s. 11
Bankruptcy Act 1967, ss. 2, 24(5), (4), 36, 38, 43, 54
National Land Code 1965, ss. 349, 349(3)

For the applicant (Official Assignee) - Zaleha bt. Yusof, FC
For the respondent (Citibank) - Ong See Seng; M/s. Mah-Kok & Din

JUDGMENT

VC George J:

A Receiving Order was made in respect of Kwan Chew Shen and he was adjudged a bankrupt. This was on 23 August 1982. From then and certainly up to 4 February 1983 Kwan continued to be and probably still is an undischarged bankrupt.

Kwan had been the registered proprietor of the whole of the land held under H.S.(D) 222000 (P.N. 3511) P.T. 40352 Mukim of Kuala Lumpur (hereinafter referred to as the land) since 1 November 1980. He did not disclose his ownership of the property to the Official Assignee, either in the statement of affairs filed by him or at all.

On 3 January 1983 Kwan charged the said land to Citibank N.A. to secure the repayment of a loan granted to him on that day which charge was registered in the Land Office on 4 February 1983 pursuant to the provisions therefor in the National Land Code. The Bank was not aware of the fact that Kwan was an undischarged bankrupt and the Official Assignee was not aware of the loan transaction or of the creation of the charge.

Another relevant fact is that the Official Assignee had apparently inadvertently failed to publish in the *gazette* and advertise in any newspaper notice of the adjudication of Kwan as a bankrupt as required by s. 24(5) of the Bankruptcy Act 1967.

The Official Assignee now moves the Court by Notice of Motion moved by Federal Counsel Puan Zaleha bt. Yusof for a declaration that because the charge was created and registered after the receiving order had been made (and while the chargor was still an undischarged bankrupt) it did not enjoy the protection of s. 54 of the Act and that accordingly it is void. Puan Zaleha relied on s. 24(4) of the Act read together with the definition of "property" in s. 2 to contend that the land vested in the Official Assignee as soon as the receiving order was made (i.e., on 23 August 1982) and that accordingly the charge created by the bankrupt, thereafter, in respect of the land was invalid. She also contended that nothing turned on the omission on the part of the Official Assignee to meet the requirements of s. 24(5).

It is unarguable that s. 54 of the Act provides protection only for *bona fid*e transactions without notice in respect of transactions that took place before the date of the receiving order. In the instant case it is not disputed that the charge was executed and registered well after the date the receiving order was made. I agree with Puan Zaleha that accordingly the bank cannot seek the protection of this section.

The two sub-section to s. 24 that have been referred to are as follows:

> (4) When a debtor is adjudged bankrupt his property shall become divisible among his creditors and shall vest in the Official Assignee.
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> (5) Notice of every order adjudging a debtor bankrupt, stating the name, address and description of the bankrupt and the date of the adjudication shall be published in the *Gazette* and advertised in a local paper as prescribed, and the date of the order shall for the purposes of this Act be the date of the adjudication.

It seems to me clear that the publication and advertisement of the orders made are not conditions or requirements that have to be met before the vesting of property in the Official Assignee takes place. In *Re Wigzell, ex parte Hart* [1921] 2 KB 835 the Master of the Rolls was of that opinion in respect of similar provisions in the English Bankruptcy Act. At p. 854 of the report the learned Judge said,

> The Legislature has fixed the date of the receiving order, and not the date at which the public notice of it is given as the date at which the trustee's rights accrue ...

I hold that when or whether the publication and advertisement required by s. 24(5) are effected is not relevant to the issue as to when the property of the bankrupt vests in the Official Assignee.

Encik Ong See Seng of Counsel for the Bank had no quarrel with Puan Zaleha's contention in respect of the effect of the omission to effect the publication and advertisement prescribed by s. 24(5) and in respect of s. 54 both of which contentions, as has been seen, I have accepted as correct statements of the law. However, he takes issue with Puan Zaleha's submission on the effect of s. 24(4) in respect of land or an interest in land. His contention is that in that context s. 24(4) has to be read having in mind that we have the Torrens system of land registration and that accordingly the sub-section has to be read subject to provisions in the National Land Code and thus read would give a different complexion to the matter than if the sub-section is read in isolation.

Now, in the Bankruptcy Act there is a chapter that is entitled "Realisation of Property". In that chapter are sections that provide powers exercisable (and the procedures by which such powers are to be exercised) by the Official Assignee in order to realise the property of the bankrupt. There are provisions for the Official Assignee forthwith after the adjudication to take possession of the bankrupt's property capable of manual delivery with the right, if necessary, to "break open any house, building or room .... or receptacle" to take such possession. There are specific provisions for the taking over of the bankrupt's stock and shares, money and securities, salary and income. However (and in Encik Ong See Seng's submission, significantly) there are no specific provisions in the chapter or elsewhere in the Act providing a procedure for the manifestation of the vesting of the land or any interest in land of the bankrupt in the Official Assignee. This omission becomes even more significant when it is realised that the missing provisions are to be found in s. 349 of the National Land Code which is as follows:

> 349. (1) Where the Official Assignee claims any land, or share or interest in land, under any written law for the time being in force relating to bankruptcy, he may apply to the Registrar under this section for the registration thereof in his name, and the Registrar shall give effect to the application by endorsing a memorial of the transmission on the register document of title to the land in question or, as the case may be, the land in which the share or interest in question subsists.
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> (2) Every such memorial shall be signed and sealed by the Registrar, and a copy thereof shall, if he is able to secure its production, be made by him on the issue document of title to the said land or, where the memorial relates to a lease or charge, on the duplicate thereof.
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> (3) No land, share or interest shall vest in the Official Assignee under any adjudication of bankruptcy, or order for administration in bankruptcy, until it has become registered in his name pursuant to this section.

In *Eng Mee Yong v. Letchumanan* [1980] AC 331 Lord Diplock in the advice of the Privy Council to His Majesty the Yang di-Pertuan Agong, said at p. 335:

> The Torrens system of land registration and conveyancing, as applied in Malaya by the National Land Code, has as one of its principal objects to give certainly to title to land and registrable interests in land. Since the instant case is concerned with title to the land itself their Lordships will confine their remarks to this, though similar principles apply to other registrable interests. By s. 340 of the title of any person to land of which he is registered as

> proprietor in undefeasible except in cases of fraud, forgery or illegality, and even in such cases a *bona fide* purchaser for value can safely deal with the registered proprietor and will acquire from him an undefeasible registered title.

In *Damodaran v. Choe Kuan Him* [1980] AC 497, Lord Diplock, at p. 502, quoted from a judgment of the Court of Appeal of New Zealand (*Fels v. Knowles* [1906] 26 NZLR 604, 620):

> The cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorised by the statute. Everything which can registered gives, in the absence of fraud, an indefeasible title to the estate or interest ...

He went on to say,

> In the National Land Code it is s. 340 that expressly provides that the title of a person registered as proprietor of any land shall be undefeasible. The only exceptions are where there has been fraud, misrepresentation, forgery or an *ultra vires* acquisition purporting to have been made under statutory authority. None of these exceptions apply to the instant case. Interest in land, short of proprietorship, which are capable of being registered are leases, charges and easements. If registered they would amount to encumbrances within the meaning of a covenant against encumbrances; but unless registered they do not derogate from the unencumbered title of the registered proprietor of the land. Claims to be entitled to the proprietorship of land or a registrable interest in land, whether or not they are the subject of litigation, are not registrable as encumbrances on a registered title.

It is in the light of this cardinal principle of the National Land Code that the apparent contradiction between s. 24(4) of the Bankruptcy Act and s. 349(3) of the National Land Code must be considered.

If it is at all possible the words of a statute must be construed so as to give them a sensible meaning, a meaning that is not absurd. I would venture to say that it would not possibly have been the intention of the legislature in promulgating s. 24(4) of the Bankruptcy Act to run foul of the cardinal policy of the National Land Code. To construe s. 24(4) to give it such a meaning is to give it a meaning that is so extraordinary as to be absurd. In the face of that kind of situation the Court is permitted, if necessary, to even ignore words (In *re Lockwood Alberton v. Brooke* [1958] Ch 231) or add words (*Adler v. George* [1964] 2 QB 7).

Having the Torrens system in particular s. 349 of the National Land Code in mind, it is obvious that s. 24(4) of the Bankruptcy Act should be read subject to the requirements of s. 349, as far as land and interest in land is concerned. This is not to make for s. 24(4) to be pointless. Section 24(4) of the Bankruptcy Act and s. 349 of the National Land Code should be read as complementing each other. Section 24(4) in the context of the Torrens system has the effect that upon the adjudication of bankruptcy, land and interest in land belonging to the bankrupt vests in equity (and not at law) in the Official Assignee. It will only vest in the Official Assignee at law when the requirements of the law of registration as provided by s. 349 have been met. In New Zealand which is another jurisdiction where the Torrens system of land registration obtains, a similar conflict, as it were, arose between the vesting provisions in the bankruptcy laws and the requirements of registration of interest in land in the 1907 case of *Messiter v. Wollerman* 27 NZLR 581. At p. 591 of the report is this passage that speaks for itself:

a The title to the land is under the Land Transfer Act. Although the Official Assignee did not upon Wollerman's bankruptcy disclaim the lease, he did not in any way interfere with it, nor claim any rent payable by the appellant in respect of the interest taken by him under the transfer from White, nor did he register a transmission, and the transfer from White to the appellant was after Wollerman's bankruptcy. The right to Wollerman's interest in the leasehold transferred to Wollerman and Freeman by Hakaraia passed to the Official Assignee upon Wollerman's bankruptcy by virtue of s. 63 of "The Bankruptcy Act 1892," but until a b transmission was registered no estate or interest passed to him under the Land Transfer Act. Therefore, had Wollerman transferred his interest to some person who had no notice of the bankruptcy, and had such person registered his transfer before any transmission was registered, Wollerman's interest would, notwithstanding his bankruptcy, have passed to such person. In In *re Ross* Mr. Justice Williams said, 'The essence of the Act is no estate or interest passes under the Act except by registration.' Till a person has registered he has, under the Act, no c right at all against the land. There is a special provision for registering transmission, and until the transmission is registered there would be nothing that I know of to prevent the bankrupts (the lessees in the present case) from assigning their interest to a person who had no notice of the bankruptcy, and for him to become the registered proprietor in their stead.

Before concluding it is perhaps relevant to consider one other aspect of the matter based on the wide behalf that once a person is adjudged bankrupt the right to enter into contracts d ceases until such time as he is discharged.

This is an erroneous belief.

Sections 36 and 38 of the Bankruptcy Act set out the disqualifications and disabilities of a bankrupt. *Inter alia* he may not hold certain offices, he may not sue without the sanction of the Official Assignee, he may not without the permission of the Official Assignee enter into e or carry on any business, become a director (or take part in the management) of any company and so on. While he may not enter into a contract that would amount to his carrying on a business, it is significant that there is no blanket prohibition, express or implied, for a bankrupt to enter into a contract.

In the National Land Code (see s. 43) it is seen that while minors are specifically precluded from the classes of persons and bodies who may move the State authority in respect of its f powers to dispose of land, bankrupts are not, not even by implication. Again in respect of the creation of charges there does not appear to be any exclusion of bankrupts being chargors. Further, while persons of unsound mind are specifically excluded from being competent persons to enter into contracts by s. 11 of the Contracts Act, bankrupts are not.

The upshot of all this is that there appears to be no blanket provision anywhere to the g effect that a bankrupt is incapable of making a contract.

I agree with Encik Ong See Seng that the provisions of s. 49 of the Bankruptcy Act for there to be a second or subsequent receiving order fortify the view that a bankrupt in fact is competent to enter into contracts other than those that he had specifically been excluded from entering into.

h The motion, notice of which is encl. (15), is dismissed with costs.

Also found at [1987] 1 CLJ 314

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